No. 88-40 (2)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

UNITED STATES OF AMERICA,

Petitioner,

v.

FRANK S. ZOLIN, CHURCH OF SCIENTOLOGY OF CALIFORNIA and MARY SUE HUBBARD,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' SUGGESTION OF MOOTNESS AND BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Dated: September 26, 1988

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Parties to the Proceedings Below and Rule 28.1 List

The parties to the proceedings below are set forth in the caption.

Respondent Church of Scientology of California has no parent companies, subsidiaries or affiliates to list pursuant to Rule 28.1.

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Respondents Church of Scientology of California and Mary Sue Hubbard respectfully request that this Court deny the petition for writ of certiorari seeking review of the judgment of the Ninth Circuit in this case. Respondents further suggest that this case is now moot.

Statement of the Case

This case arises from the efforts of the Internal Revenue Service to obtain thirteen documents or tapes which were held under seal by the Clerk of the California Superior Court following a civil trial. The courts below denied the government access to eight items, including tape recordings (the "MCCS tapes") of meetings between

Church representatives and legal counsel, on the ground that the meetings are protected from disclosure by the attorney-client privilege. The courts below enforced the summons with respect to five documents, but ordered that these five documents "shall not be delivered to any other government agency by the IRS unless criminal tax prosecution is sought or an Order of Court is obtained." (Pet. App. 29a.)

1. In July 1984, the Criminal Investigation Division of the Los Angeles District Director's Office of the IRS commenced a tax investigation of L. Ron Hubbard. On October 24, 1984, the IRS served an administrative summons upon the County Clerk for Los Angeles County, who also serves as Clerk for the California Superior Court for Los Angeles, seeking production of numerous exhibits which were contained in the record of a pending Superior Court action entitled *Church of Scientology of California* v. *Armstrong* (No. C420153) and which remained under seal in the custody of the Clerk. The summons was captioned as relating to the investigation of Mr. Hubbard for the years 1979 through 1983. The Clerk agreed to produce some of the documents, but refused to allow the IRS to inspect and copy thirteen documents which had been sealed on various grounds, including attorney-client privilege, marital privilege and privacy, by the Superior Court.

On January 18, 1985, the government commenced this proceeding by filing a petition to enforce the summons, naming the County Clerk for Los Angeles County as the sole defendant. Thereafter, the Church and Mrs. Hubbard intervened in the district court to oppose enforcement of the summons. To the extent relevant here, the respondents opposed enforcement on two grounds: (1) with respect to the MCCS tapes, that they are protected by the attorney-client privilege; and (2) generally, that the summons had been issued for collateral purposes, *i.e.*, gathering information for use by other government agencies.

2. With respect to the MCCS tapes, the Church submitted affidavits demonstrating that the prerequisites for the assertion of the attorney-client privilege were present, *i.e.*, the tapes recorded communications between client and attorneys acting in their professional capacity, the communications were related to legal matters, and the communications were confidential. The government, while disputing the presence of various elements of the privilege, relied in large part on its assertion that the crime-fraud exception to the privilege stripped the tapes of their protection from disclosure. In support of its assertion, the government initially submitted a declaration of Special Agent Petersell based upon conversations he had had with a former Church staff member, and excerpts from the tapes set forth in the declaration of Gerald Armstrong, a former Church employee. The government requested the district court to review the tapes themselves to determine whether the crime-fraud exception was made out.

The Church responded that the court could not review the actual communications—whether in the form of transcripts, excerpts or the tapes themselves—to determine the application of the crime-fraud exception to the privilege, but rather must rely initially upon evidence independent of the communications in issue. The district court reserved judgment on this issue as well as whether the government had provided sufficient facts for the court to look further.

Four days later, and before any ruling from the district court on the propriety of its review of the contents of the communications in issue, the government filed yet another declaration of Agent Petersell, which had attached to it seventeen single spaced pages of a transcript of the tapes.[1]

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[1] The source of the transcript has never been revealed. The the government has stated that the source is not relevant to the issues of waiver which had been raised in the courts below. The

(footnote continued on following page)

Thereafter, on April 30, 1985, the district court ruled that it would consider the portions of the communications themselves to determine whether the crime-fraud exception applied to the tapes. During the hearing, the district court stated that it had reviewed all of the government's submissions, including the Petersell declaration with the seventeen pages of single spaced transcript of the tapes, and that it was inclined to rule that the exception to the privilege had not been made out. The district court specifically asked government counsel to "point out where I went wrong" (April 30, 1985 Transcript of Proceedings at 73) whereupon government counsel identified particular portions of the declarations and record. The colloquy ended with the district court asking if there was "anything else you [government counsel] want to point to" and government counsel replying negatively. At no point during this argument did the government request or suggest that the court should or was required to review the entire tapes themselves. Thereupon, the district court ruled that the crime-fraud exception did not apply.

The government moved for reconsideration, asserting that the district court should have reviewed the entire two hours of tapes. In doing so, the government sought to rely upon a declaration of Agent Phillip Xanthos which it filed under seal for *ex parte in camera* inspection by the district court without furnishing a copy to any other party.[2] The district court denied the motion for reconsideration on two grounds. First, it ruled that although a review of the tapes themselves had been discussed at one point,

(footnote continued from previous page)

transcripts were placed under seal by the district court on motion of the Church, and remained under seal in the Ninth Circuit, which also forbade counsel from quoting from them in the course of oral argument.

[2] The government never identified any basis for filing the declaration on an *ex parte* basis. The Church first received a copy of it during the proceedings in the Ninth Circuit. The declaration remains under seal.

"thereafter Mr. Petersell's declaration [with the seventeen-page single-spaced transcript] was submitted, and no one suggested that this was an inadequate basis on which to determine the attorney-client privilege question". (Pet. App. 26a.) Indeed, during argument on the motion for reconsideration, the district court explained its view that the government had waived its belated attempt to require the district court to listen to the complete two hours of tape when it had abandoned the argument after some discussion, submitted the seventeen page transcript and argued the case on the basis of those materials.[3] Second, the court ruled that "no reason is suggested as to why it [Mr. Xanthos' declaration] could not have been submitted as a part of the materials considered in the April hearings." (Pet. App. 26a.) According to local rule 7.16, a motion for reconsideration must rely upon facts or evidence which were not available at the time of initial consideration.

3. The district court did hold that five of the thirteen documents sought by the government were relevant to the tax years under investigation and that any privileges which could be raised had been waived. Prior to enforcing the summons as to the five documents, however, the district court held an evidentiary hearing on the good faith of the government. The hearing showed that the IRS agents responsible for issuing the administrative summons had communicated and partially coordinated their investigation with Justice Department attorneys representing other IRS agents who were defendants in a civil action brought by the Church alleging government misconduct.

Although the district court found that the record did not rise to the level necessary to deny enforcement of the

[3] When the district court asked "what's there to do now by hindsight" the government quite honestly responded "Nothing, Your Honor". Government counsel then tried to assert that they had not waived the argument, to which the district court observed they "[c]ertainly" had. (June 10, 1985 Transcript of Proceedings at 5.)

summons, it considered the case *sui generis* because of the many non-tax related civil litigations between the government and the Church and because of concern that "information acquired for one purpose may be in effect used for civil discovery in the other." (June 10, 1985 R.T. at 9.) Accordingly, the district court ordered that the five documents "shall not be delivered to any other government agency by the IRS unless criminal tax prosecution is sought or an Order of Court is obtained." (Pet. App. 29a.) The district court emphasized that as long as the intended disclosure was authorized by 26 U.S.C. § 6103, it would allow the disclosure.

4. A panel of the United States Court of Appeals for the Ninth Circuit affirmed the district court's judgment. (Pet. App. 11a-24a.) The panel held that the district court order requiring that the five documents not be delivered to any other government agency by the IRS unless criminal tax prosecution is sought or a court order is obtained was an appropriate and wise exercise of the district court's discretion. The panel reasoned that since the government had invoked the court's process to enforce the summons, the court had the power and authority to prevent its process from being abused. The panel rejected the government's argument that the order ran afoul of the Anti-Injunction Act, 26 U.S.C. § 7421(a), relying on the decision in *United States* v. *Author Services, Inc.*, 804 F.2d 1520, 1526 (9th Cir. 1986), where the court reasoned that "restricting disclosure of summoned information to other agencies only to the extent that a court order is necessary, does not restrain the assessment or collection of tax liability."

The panel affirmed the rulings of the district court with respect to the MCCS tapes. The panel applied the holding of *United States* v. *Shewfelt*, 455 F.2d 836, 840 (9th Cir.), *cert. denied*, 406 U.S. 944 (1972), that before the privileged status of the communications is lifted on the basis

of the crime-fraud exception, the government must first make a *prima facie* showing independently of the communications that the communications were in furtherance of an intended or present illegality. The panel then reviewed the government's evidence and held that it was not sufficient to make the requisite *prima facie* showing.

Thereafter, the government petitioned for rehearing and suggested rehearing *en banc* on both the order limiting disclosure to other agencies and the independent evidence rule, asserting an intra-circuit conflict on the latter question between *United States* v. *Friedman*, 445 F.2d 1076 (9th Cir.), *cert. denied*, 404 U.S. 958 (1971), and *United States* v. *Shewfelt*, 455 F.2d 836 (9th Cir. 1972). On November 6, 1987, the petition for rehearing *en banc* was granted. (Pet. App. 10a.)

On March 28, 1988, the *en banc* Court filed an order vacating the November 6, 1987 order granting *en banc* review as improvidently granted. (Pet. App. 1a-2a.) The *en banc* court explained that review had been granted on the mistaken assumption that there was a conflict between the panel decisions in *Shewfelt* and *Friedman*. The *en banc* court ordered that a portion of the panel opinion be withdrawn and, in all other respects, the panel opinion remained intact.

Three members of the *en banc* court dissented from the order vacating the November 6, 1987 order, but stated that they nevertheless would affirm the district court. (Pet. App. 2a-9a.) The dissenters wrote that the proper rule would "make *in camera* review discretionary for the district court to reject the crime-fraud exception, mandatory for the district court to allow the exception and order disclosure." (Pet. App. 9a.) The dissenters explained that under such a rule, the district court decision must be affirmed. This was so because when the district court initially ruled on the application of the exception, the government had submitted the transcripts submitted with the

Petersell declaration and it did not argue that the partial transcripts were an inadequate basis on which to decide the issue. Thus, when the government asked for reconsideration and attempted to submit the declaration of Mr. Xanthos purportedly discussing other portions of the tapes, the government never explained why it had failed to include this material in its prior submissions. In the dissenters' view, the issue was reduced to whether the district court acted within its discretion in considering only the transcripts initially submitted by the government and in not considering the material submitted for the first time on reconsideration. The dissenters would have held that there was no abuse of discretion. (Pet. App. 9a.)

In a separate concurrence (App. *infra*, 1a-2a) one member of the *en banc* court expressed the view that it was procedurally unclear whether the *en banc* order was a disposition on the merits and opined that if so, it is internally inconsistent because the *en banc* court cannot both decide a case on the merits and vacate its order granting *en banc* review. Nonetheless, the concurrence agreed that the independent evidence rule should be the law.

Suggestion of Mootness

The Internal Revenue Service Criminal Investigation Division summons which was the subject of the litigation below was dated October 24, 1984. The summons is captioned "In the Matter of Lafayette R. Hubbard" and concerns the tax years 1979-1983. Mr. Hubbard died on January 24, 1986, thus foreclosing any further criminal investigation of him. Subsequent to the filing of the government's petition herein, we have been informed by tax counsel for Mr. Hubbard's estate that the IRS civil audit of Mr. Hubbard's returns for the years 1979-1983 was terminated as a "closed case" as that term is defined in Rev. Proc. 85-13, Sec. 3.01(1); 1985-1 C.B. 514. We were

further informed that the requisite IRS Forms 870 for those years have been signed. As set forth in 26 CFR 601.105 (4), the signing of such forms "[a]s a matter of practice . . . ordinarily result[s] in the closing of a case insofar as the Government is concerned." Therefore, there would appear to be no remaining IRS proceedings, either criminal *or civil*, which could justify enforcement of the underlying summons, and all legal issues raised with respect to the summons are moot.

In the related case of *United States* v. *Author Services, Inc.*, 804 F.2d 1520 (9th Cir. 1986), *amended*, 811 F.2d 1264 (9th Cir. 1987) the court of appeals considered whether Mr. Hubbard's death rendered moot the enforcement of a similar IRS Criminal Investigation Division summons issued to another entity for other records regarding the identical investigation of Mr. Hubbard. The court of appeals concluded that the matter was not moot at that time because the records sought by the summons might still be relevant to a *civil* review of Mr. Hubbard's returns for the years at issue:

> During the pendency of this appeal, L. Ron Hubbard died, and ASI argues that the cause is now moot because the IRS summons was issued in furtherance of an exclusively criminal investigation. We are persuaded that the investigation of Mr. Hubbard, although primarily criminal in nature, entails essential civil elements as well, which survive his death. The summons seeks documents relating to the financial affairs of L. Ron Hubbard as they pertain to his tax liability or to any offenses connected with internal revenue laws. Therefore, this appeal is not moot.

804 F.2d at 1522 n.1.

In the instant case, the original panel of the court of appeals rejected a mootness suggestion "for the reason stated" in the *Author Services* case. 804 F.2d at 1414.

Now, however, no civil component to the summons can even arguably remain as the IRS has concluded its audit of Mr. Hubbard's returns for the years 1979-1983. Thus any further resolution of the legal issues posed by the government's petition would be purely hypothetical and abstract as there is no remaining case or controversy. *De Funis* v. *Odegaard*, 416 U.S. 312, 317 (1974).

REASONS WHY THE PETITION SHOULD BE DENIED

1. The Order Restricting Dissemination Of The Contents Of The Documents Ordered Produced To The IRS Was Consistent With Decisions Of This Court Recognizing The District Court's Discretion And Power To Protect Against Potential Abuses Of Its Process In Enforcing IRS Administrative Summonses, And Is Not In Conflict With The Holding Of The Fifth Circuit In Barrett.

a. In *United States* v. *Powell*, 379 U.S. 48 (1964), this Court unambiguously affirmed in the context of an IRS summons enforcement proceeding that the district court's role in an IRS summons enforcement proceeding is more than perfunctory. "It is the court's process which is invoked to enforce the administrative summons and *a court may not permit its process to be abused.*" 379 U.S. at 58. (emphasis added.) Although over the years the courts have been careful to leave the substantial burden of showing such an abuse on the taxpayer, and the procedures employed by the courts have assured that only assertions of abuses with a foundation in fact are subject to judicial inquiry, this Court has adhered to the fundamental tenet that the court's authority and process may not be abused.

In *United States* v. *LaSalle National Bank*, 437 U.S. 298 (1977), this Court had occasion to consider the contours of a district court's authority to prevent abuses of its process. The Court specifically recognized that the "good

faith standard will not permit the IRS to become an information-gathering agency for other departments, including the Department of Justice, regardless of the status of criminal cases." 437 U.S. at 317 (footnote omitted). As the Court observed, the IRS' authority to summon private papers is not inherent; it has only such authority as Congress bestowed upon it. 437 U.S. at 317 n.18. Thus, while recognizing a core set of requirements for enforcement of the summons, this Court wrote that "[t]hese requirements are not intended to be exclusive. Future cases may well reveal the need to prevent other forms of agency abuse of congressional authority and judicial process." 437 U.S. at 318, n.20.[4]

Just as the IRS does not have inherent authority to summon private papers, it has no inherent authority to compel compliance with a summons. Under 26 U.S.C. §7402, if the IRS desires to compel compliance with a summons, it must invoke the power and process of a district court. Once their process is invoked, the district courts necessarily have broad and inherent power "over their own process, to prevent abuses, oppression and injustice . . ." *Gumbel* v. *Pitkin*, 124 U.S. 131, 144 (1888). *See also S.E.C.* v. *ESM Government Securities, Inc.*, 645 F.2d 310, 316-17 (5th Cir. 1981); *Gluck* v. *United States*, 771 F.2d 750, 758 n.8 (3d Cir. 1985) (abuse of process rule in IRS summons cases has "clear judicial integrity overtones" and "deterrence of governmental misconduct is an important . . . consideration"). The placement of the power to enforce the summons in the judiciary was deliberate and did not "in any way purport[] to limit the power of the judiciary to choose an appropriate rule of decision in an enforce-

[4] Nothing in *United States* v. *Arthur Young & Co.*, 465 U.S. 805 (1984) restricts a district court's power or authority to prevent its process from being abused. The authority to prevent such an abuse is fundamentally different from the court's authority to create a work product immunity for an auditor's tax accrual work papers.

ment proceeding." *United States* v. *Friedman*, 532 F.2d 928, 937 (3rd Cir. 1976). Indeed, "the very fact" that enforcement of a summons is "entrusted to the judiciary" leads to the conclusion that the "court has the power to fashion appropriate rules as to the fairness of the enforcement order." *Id. See United States* v. *Columbia Broadcasting System, Inc.*, 666 F.2d 364, 368 (9th Cir.), *cert. denied*, 457 U.S. 1118 (1982) (relying upon analogy between enforcement of IRS summons and enforcement of third party subpoena in civil litigation.)[5]

The district court's order in this case is well within the authority recognized in *Powell* and *LaSalle*. The order merely provides that "[t]he documents delivered hereunder shall not be delivered to any other government agency by the IRS unless criminal tax prosecution is sought or an Order of Court is obtained." (Pet. App. 29a.) The order affects only disclosures to other government agencies, and is carefully tailored to the unique circumstances presented to the courts below. The purpose of the district court's order was to assure that the IRS not act as an information gathering agency for other branches of the federal government involved in unrelated civil litigation with the Church. That concern arose out of substantial evidence that government attorneys in unrelated civil litigation were seeking the very documents sought by

[5] In these respects, proceedings to enforce an IRS summons are little different than any other civil proceeding in the district court. Although there are many aspects peculiar to summons enforcement proceedings, there is nothing in Section 7604(a) which deprives the district court of its full panoply of power and authority to control the proceeding and its process. For example, both the district and appellate court here ordered a number of pleadings filed and kept under seal. Nothing in the statute mentions any authority to do so but no one could doubt the authority of the courts to issue such orders. Similarly, the district court ordered the IRS to explain to it the source of the transcripts of the tapes which the IRS submitted. No one could doubt the authority of the court to require the government to do so.

the IRS in these enforcement proceedings, that the IRS special agents seeking the documents here had ongoing discussions with the government attorneys in the unrelated civil litigation concerning these very documents, and that witnesses summoned by the IRS special agents were interviewed first by the special agents and then by the government attorneys in the unrelated civil litigation under the false impression that the administrative summons applied to the unrelated civil litigation. Transcript of hearing of April 29-30, 1985, *passim* and at 87.

The order does not interfere in the least with the IRS' mission either by threatening any delays or by holding out the prospect of "constant scrutiny and attack by the summoned party." (Pet. 14.) The order does not itself impair the IRS' ability to conduct tax investigations (Pet. App. 14) because such investigations are not dependent upon disclosures to other government agencies. Indeed, in opposing the order in the district court, the specific examples of concern articulated by the government principally centered upon requests for information from other federal agencies for the purposes of enforcing non-tax related federal laws.[6] Moreover, as the district court assured the government, if a disclosure were sought for the purpose of furthering the IRS investigation, the court would allow it expeditiously.[7] In such an event, any hypothetical delay would be non-existent or minimal. The decision below does not require that the application to the district court be on notice to any other party. In fact, the district court specifically left the question of notice to be addressed if such

[6] The order itself allows for disclosure if a criminal tax investigation is sought.

[7] To the extent there might be a need to seek to disclose the documents to another government agency for a purpose not relating to enforcement of the tax laws, any such delay is minimal and by definition does not affect the tax laws.

an application were ever made by the government. Transcript of hearing of June 10, 1985, pp. 11-12.

The government's argument would require that a district court is limited either to enforcing a summons without any restriction, or denying it in its entirety. Such an "all or nothing" approach is simply inconsistent with the inherent power of a district court over its own process. It reduces a district court to a ministerial role, forced to stand by silently even if its process is misused. It is particularly peculiar because the effect of an "all or nothing" rule will certainly be "nothing" in at least some cases. Such a rule, which would in fact provide the IRS with less information, is contrary to logic.

b. The government relies heavily upon the decision in *United States* v. *Barrett*, 837 F.2d 1341 (5th Cir. 1988), *petition for cert. pending*, No. 87-1705, without acknowledging the critical differences between the two cases. *Barrett* involved a restriction on the means by which the IRS could investigate the tax liability of the taxpayer, and not merely, as here, a restriction upon the IRS' disclosure to other government agencies of the contents of the very documents subject to the administrative summons. In *Barrett*, the taxpayer sought an order prohibiting the IRS from continuing to send letters to Dr. Barrett's patients advising them that Dr. Barrett was being investigated by the Criminal Investigative Division of the IRS and requesting documentation of fees paid to Dr. Barrett. 837 F.2d at 1343. *See also*, *Barrett* v. *United States*, 804 F.2d 1376, 1379 (5th Cir. 1986), *vacated*, 812 F.2d 936 (5th Cir. 1987). Barrett contended that these disclosures violated 26 U.S.C. § 6103. The issue was whether Barrett was entitled to a hearing on whether there had been a disclosure of "return information" in violation of Section 6103, and, if so, whether enforcement of the IRS summons should be conditioned in order to protect Barrett against unnecessary disclosure of the fact that he was under criminal investigation. *See, e.g.*, 837 F.2d at 1343 (*per curiam*)

and 1356 (Brown, J., concurring and dissenting). The restriction sought in *Barrett* thus was not limited to the IRS' dissemination of the contents of the documents sought in the summons, but rather would have applied to the *methods* the IRS could employ in its investigation. The order here affects only the very documents which the IRS will obtain as a result of the court's enforcement order, and only to the highly limited extent that it temporarily bars disclosure of their contents to other government agencies. It thus extends no further than to control the use of the district court's process itself, and is intended to prevent the IRS from functioning as an information-gathering agency for other federal agencies involved in civil litigation with the Church, under the special circumstances of this case. *Barrett*, on the other hand, presents a much more serious question concerning the power of a district court to withhold enforcement of a summons unless the IRS complies with restrictions on its tax investigation methods beyond use of the contents of the documents directly summoned.

c. Nothing in Section 6103 indicates that the statute was intended to displace the district court's authority to prevent abuse of its process or to allow the IRS to use its summons power to gather information for other federal agencies. *See United States* v. *LaSalle National Bank*, *supra*, 437 U.S. at 317-318. Section 6103 was enacted primarily to regulate and restrict access to tax returns and return information by the many governmental bodies and agencies that routinely had access to such information under the prior practice. Subsection 6103(a) states the general rule that "returns and return information shall be confidential" and shall not be disclosed except as authorized by Section 6103. *American Friends Service Committee* v. *Webster*, 720 F.2d 29, 70 (D.C. Cir. 1983); *Chamberlain* v. *Kurtz*, 589 F.2d 827, 835-36 (5th Cir.), *cert. denied*, 444 U.S. 842 (1979). Consistent with this policy, the district court included an appropriate provision to as-

sure that the IRS did not function as an information-gathering agency for the other federal agencies in unrelated litigation with the Church. At the same time, the district court assured the government that any disclosure to another governmental agency which is provided for by Section 6103 would be permitted.[8] Only if the district court refused to allow disclosure which Section 6103 permitted could it be said that the district court was acting inconsistently with Section 6103.

d. The government asserts that the Anti-Injunction Act, 26 U.S.C. § 7421(a), prohibits the district court's order. Section 7421(a) by its terms is not applicable here in that no suit was brought to enjoin "the assessment or collection of any tax," 26 U.S.C. § 7421(a), but rather the purpose of the Internal Revenue Service investigation was contested in a summons enforcement proceeding.[9] More

[8] The government's insistence (Pet. 17-18) that a civil damage action after an improper disclosure is the proper remedy ignores the obvious: a "damage remedy *after* the information is released fails to protect [the] right to confidentiality." *Tierney* v. *Schweiker*, 718 F.2d 449, 457 (D.C. Cir. 1983) (emphasis in original).

[9] In *United States* v. *First Family Mortgage Corp.*, 739 F.2d 1275 (7th Cir. 1984), relied upon by the government (Pet. 18), the summons enforcement action was voluntarily dismissed after the government obtained the documents but before the taxpayer intervened. The court held that the action was moot because the IRS had already obtained the summoned documents. Based on that finding, the court was of the view that the Anti-Injunction Act barred the taxpayer's attempt to stop the IRS from using the documents it had previously obtained; the taxpayer was, in fact, maintaining a suit. In *Black* v. *United States*, 534 F.2d 524 (2d Cir. 1976), the Anti-Injunction Act barred the suit because the lawsuit was in fact an independent suit to enjoin the IRS from continuing its investigation. *Lowrie* v. *United States*, 824 F.2d 827 (10th Cir. 1987), also relied upon by the government (Pet. 18), is equally unhelpful to the government. There the taxpayer filed a lawsuit the purpose of which was not merely to obtain return of documents from the IRS, but rather was "to head off action against him, of whatever nature by the IRS." 824 F.2d at 831 (footnote omitted). Here in contrast there is no purpose to "head off" IRS action: the IRS is free to pursue its investigation using the documents.

importantly, the order does not in any way restrain the assessment or collection of any tax. The IRS is free to pursue any legitimate investigation and certainly free to assess or collect any and all taxes it deems are due which in fact it has now done. "The manifest purpose of § 7421 (a) is to permit the United States to assess and collect taxes alleged to be due without judicial intervention, and to require that the legal right to the disputed sums be determined in a suit for refund." *Enochs* v. *Williams Packing Co.*, 370 U.S. 1, 7 (1962). *See also Bob Jones University* v. *Simon*, 416 U.S. 725, 736-37 (1974). The only purpose and effect of the order is to prevent the IRS from abusing the court's power to enforce the summons. The Anti-Injunction Act has no bearing whatsoever on the propriety of the order.

2. The Independent Evidence Issue Which The Petition Seeks To Raise Is Not Squarely Presented By The Record Before The District Court. Which Did Not Apply An Independent Evidence Rule.

The petition with respect to the crime-fraud issue devotes itself exclusively to an abstract discussion of law which is not squarely presented by the record in this case. Whatever the outcome of the debate, its resolution will have no effect on this case.

The district court held that it had the authority to review the contents of the privileged communications to determine the application of the crime-fraud exception. Following that ruling, the district court in fact reviewed the communications in detail with government counsel at the April 30, 1985 hearing. After hearing every argument the government chose to make, and after engaging in an extended colloquy with government counsel as to the merits of those arguments, the district court held the communications to be privileged. Not once during that argument on the merits did the government urge that the district court erred in the manner in which it addressed the issue. Not

once during that argument did the government make the simple statement that it thought the district court should review the complete communications rather than rely upon the portions highlighted and brought to the district court's attention by the government.

The government's quarrel is not with the district court's procedure, but rather with the tactical choice it made in the district court to submit to the court the transcripts of the tapes and to highlight only certain portions of what it believed to be evidence of crime or fraud on the tapes.

This dissatisfaction with its tactical choice first became evident when the government moved for reconsideration in the district court. The district court clearly and cogently denied reconsideration, refused to listen to the rest of the communication and refused to consider a proffered declaration, not because it believed it was barred by law from doing so, but because it found that the government had chosen to submit the transcripts and other materials and to proceed on that basis. The district court, in exercising its authority to control the proceedings before it and pursuant to Rule 7.16 of the Local Rules of the United States District Court for the Central District of California, found that because no reason was given why the argument and the materials were not included in the earlier arguments, it would deny reconsideration.

The government quite properly does not seek certiorari as to the district court's denial of reconsideration. Quite aside from the merits of the second issue presented by the petition, the reason the district court did not review the entire communication was simply because of a deliberate tactical choice made by the government in the district court. However much the government might regret that choice, its consequence hardly merits review by this Court.

For these reasons, the dissenters from the March 28, 1988 order vacating the grant of rehearing *en banc* would

have affirmed the district court judgment, notwithstanding their disagreement with the *en banc* court's disposition. As even the dissenters recognized, the dispositive issues in this case are: (1) whether the district court abused its discretion in finding that it was entitled to rely upon the government to highlight and focus the court's attention upon the critical portions of the two hours of tape; and (2) whether the district court abused its discretion in refusing to consider the belated declaration submitted for the first time on reconsideration where there was no explanation as to why the material could not have been submitted earlier and it clearly was available at the time of the April 30, 1985 decision.

Those two issues are both necessary and preliminary to any consideration of the question the government seeks to have this court review. Equally, the two questions are merely questions involving the routine application of established principles to the particular facts of this case. In short, the two questions hardly merit this Court's review.

3. The Independent Evidence Rule Is Necessary And Appropriate, And Is Consistent With Prior Decisions Of This And Other Courts.

Notwithstanding the circumstances presented here, the government urges review of the rule enunciated in *United States* v. *Shewfelt*, 455 F.2d 836 (9th Cir.), *cert. denied*, 406 U.S. 944 (1972). Under *Shewfelt*, once the claimant of the attorney-client privilege as to a particular communication has established all the required elements of the privilege, the party seeking to strip the privilege has the burden of making a *prima facie* showing that the particular communication was in furtherance of an intended or ongoing illegality and must do so, if at all, by evidence independent of the communication itself. This initial requirement that the government make the showing by evidence other than

the privileged document is supported by logic and the societal interests supporting the attorney-client privilege.

The attorney-client privilege protects "[c]onfidential disclosures by a client to an attorney made in order to obtain legal assistance. . . ." *Fisher* v. *United States*, 425 U.S. 391, 403 (1976). The attorney-client privilege serves important and vital interests in our society. The privilege exists because of "the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure." *Upjohn Co.* v. *United States*, 449 U.S. 383, 389 (1981), quoting *Hunt* v. *Blackburn*, 128 U.S. 464, 470 (1888). The purpose of the privilege is "to encourage full and frank communication between attorneys and their clients" to serve the broader public interests in the observance of law and the administration of justice. *Id.*

The privilege encourages clients not only to discuss their past acts but to seek advice concerning their future conduct. As the Ninth Circuit has noted, "the attorney-client privilege is central to the legal system and the adversary process. For these reasons, the privilege may deserve unique protection in the courts." *United States* v. *Hodge and Zweig*, 548 F.2d 1347, 1355 (9th Cir. 1977). The privilege, unlike many evidentiary rules, is not a response to concerns about the reliability of the evidence, but is designed to foster values our society deems important by safeguarding the confidentiality of the attorney-client relationship.

Courts quite properly have not permitted that expectation of confidentiality to extend to communications with attorneys designed to perpetrate present or future crime. For this reason, communications otherwise within the attorney-client privilege can be stripped of their privileged status upon a *prima facie* showing by the opponent of the

privilege that the otherwise privileged communications were in furtherance of a prospective or on-going crime or fraud. *See, e.g., Clark* v. *United States*, 289 U.S. 1, 15 (1933); *In Re Grand Jury Proceedings* [*United States* v. *Lawson*], 600 F.2d 215, 218 (9th Cir. 1979).

Once this rule is recognized, it inexorably follows that the initial showing must be made by evidence other than the privileged communication itself. Without such a requirement, any opponent of the privilege would by the mere invocation of the exception, force a detailed scrutiny of each and every attorney-client communication. The requirement serves as a necessary mechanism to separate those cases where there is truly reason to suspect that the attorney-client relationship has been misused from those cases where there is no such basis. Thus, the classic version of the independent evidence rule embodied in the common-law requires that "the Trial Judge must first determine that the government has made a *prima facie* case that the privilege does not apply because the communication was in furtherance of a crime or fraud. Only then should the Trial Judge look at the documents". S. Saltzburg & K. Redden, *Federal Rules of Evidence Manual*, at 359 (4th ed. 1986). *See also* Jones, *The Law of Evidence*, 21:18, pp. 795-96 ("There should be some independent proof of wrongful purpose; the mere suggestion of fraud does not afford sufficient ground for setting aside the general rule."); *United States* v. *Bob*, 106 F.2d 37, 40 (2nd Cir. 1939), *cert. denied*, 308 U.S. 589 (1939). As this Court stated in applying the independent evidence rule in an analogous context, "[w]hen that [independent] evidence is supplied, the seal of secrecy is broken." *Clark* v. *United States*, 289 U.S. 1, 15 (1933).[10]

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[10] *Clark* itself concerned the traditional privilege attaching to jury proceedings and the court considered the attorney-client privilege as an analogy. After finding that a similar crime-fraud exception applied to the juror's privilege, the court held the ex-

(footnote continued on following page)

The independent evidence rule is essential to prevent the attorney-client privilege from being eviscerated by the crime-fraud exception and to protect the judicial system from being overburdened by claims that the exception should be applied. A contrary rule which would require the federal courts, at both the trial and appellate levels, to engage in *in camera* review of any and all attorney-client communications upon the mere allegation of a party opposing the privilege of the exception's application, would be unjust and invite gross abuses. A party could require its opponent to open for court inspection its entire file of attorney-client discussions and frustrate the very purpose of the privilege. It would become a common litigation tactic for parties to seek massive discovery of attorney-client files, in the hope that the fear of disclosure of even innocent communications would provide a litigation advantage, perhaps in the form of inducement to abandon or settle litigation on unfavorable or unjust terms.

The onerous and negative effects of such a rule are reflected in the government's failure to clearly enunciate the rule of law which it would substitute for the independent evidence rule. If, as implicitly seems to be the case, the government's position is simply that the district and appellate courts *must in every case* review the entire communication, the consequences are clearly unacceptable from the perspective of the burden on judicial administration and preserving the core values underlying the privilege.[11]

(footnote continued from previous page)

ception applied because the "evidence of guilt is ample, without the happening in the jury room, to break down the claim of privilege, and thus let in the light." 289 U.S. at 18. In other words, *Clark* itself applied the independent evidence rule.

[11] The government is forced to adopt this extreme position because under any other rule it cannot prevail in this case. *See* Section 2, *ante*.

No doubt for these reasons, the government has pointed to no court which has endorsed an absolute requirement of review of the communications themselves. Rather, only a single court of appeals has specifically rejected the independent evidence rule and even that court does not *require* the district court to review the communications in each case. In *In Re Berkley & Co., Inc.*, 629 F.2d 548, 553 n.9 (8th Cir. 1980), the court approved of the *in camera* review of the disputed documents, as well as several hundred others, but did not establish a rule that either it or the district court is required to review the communications.

The other decisions relied upon by the government to show a purported division of view amongst the courts of appeals are no more helpful to its position. In *In Re Antitrust Grand Jury*, 805 F.2d 155 (6th Cir. 1986) the initial showing of a crime or fraud was made by evidence other than the communication sought. 805 F.2d at 168. The court, however, was of the view that before the communications were to be produced the district court must review them *in camera* to assure that each particular document fell within the exception. *Id.* Thus, in holding that the *in camera* review was mandated to determine the scope of the disclosure, the court observed that the review at that point "could have" assisted in determining whether a *prima facie* violation had been made. *Id.*

The other decisions cited by the government (Pet. 19-20), except one,[12] simply do not discuss the independent evidence rule. Thus, although it appears that the privileged documents were available for review by either the district

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[12] As the government correctly notes, one member of the Court of Appeals for the District of Columbia Circuit has expressed the view that "[i]n appropriate cases the subpoenaed material itself may provide *prima facie* evidence of a violation." *In Re Sealed Case*, 676 F.2d 793, 815 (D.C. Cir. 1982). *See In Re Sealed Case*, 754 F.2d at 403 (Mikva, J. concurring) pointing out that the discussion in *In Re Sealed Case*, 676 F.2d at 812-16, expressed only the views of the author of the opinion.

or appellate courts,[13] and were reviewed in some of the cases, the courts did not address the questions of whether a showing by independent evidence was made initially and/or whether such an independent showing is required. In at least two of the cases, the issue before the court concerning *in camera* review was the propriety of *in camera* submission of grand jury materials to the court rather than the propriety of reviewing the communications themselves. *E.g. In re John Doe Corp.*, 675 F.2d 482, 490 (2d Cir. 1982); *In re Special September 1978 Grand Jury II*, 640 F.2d 49, 56-57 (7th Cir. 1980).

In sum, the decisions do not reflect that the various courts have considered the independent evidence rule and its merits. All courts agree that there must be a *prima facie* showing. The Ninth Circuit requires that at least the initial showing that the communications were in furtherance of an illegal end be by evidence other than the suspect communication itself. No court has held that a court is required to initially review the communication itself.

The disparity, to the extent there is one, is minor and hardly of great consequence. This is particularly so because an opponent of the privilege can hardly complain with credibility of a misapplication of the exception to the privilege where they have been unable to produce even *prima facie* evidence. The requirement hardly imposes a very stringent burden to overcome. *See, e.g., In re Antitrust Grand Jury*, 805 F.2d at 165-166. In the absence of such a showing, an opponent of the privilege cannot credibly claim any injustice in upholding the privilege since it can hardly assert that it pressed the exception based on much more than idle suspicion.

The mere fact that opponents of the privilege have been able to invoke the exception successfully by independent

[13] *E.g. In re John Doe Corp.*, 675 F.2d 482 (2d Cir. 1982); *In re Grand Jury Proceedings (FMC Corp.)*, 604 F.2d 798 (3d Cir. 1979); *Union Camp. Corp.* v. *Lewis*, 385 F.2d 143 (4th Cir. 1967).

evidence puts to rest the government's argument that the rule eviscerates the exception. *See e.g., Shewfelt, Clark, Hodge and Zweig.* The fact that the government tried but failed to prove the existence of the exception by independent evidence in this case merely reflects the inadequacy of its evidence, and not a failure of the independent evidence rule.[14]

Nor does the independent evidence requirement conflict with the manner in which the validity of other claims of privilege are decided, as contended by petitioner. (Pet. 21.) For example, in *United States* v. *Nixon*, 418 U.S. 683, 713-14 (1974) relied upon by the government, (Pet. 21) the claim of privilege by the President was sufficient to render the materials presumptively privileged. It was only after the Special Prosecutor made a sufficient preliminary showing to rebut the presumption that an *in camera* examination of the subpoenaed material was appropriate. 418 U.S. at 713-14. The point, of course, of the court of appeals' opinion in this case was that the government did not make its *prima facie* showing. Whether the court of appeals would have deemed it appropriate to review the tapes at that juncture was an issue never considered or raised in the court below.

In *Kerr* v. *United States District Court*, 426 U.S. 394, 404-406 (1974), this Court indicated that an *in camera* review of certain files would be an appropriate manner of addressing a claim of governmental privilege because the nature and weight of the privilege there varied with the nature of the specific document and because of the required balancing between claims of irrelevance and priv-

[14] The government's reliance on *United States* v. *King*, 536 F. Supp. 253 (C.D. Cal. 1982) is misplaced. As the decision makes clear, there was ample independent evidence to apply the exception there. If anything, *King* illustrates the likelihood that where the attorney-client relationship is in fact abused, there will be ample evidence, other than the communications themselves, to make a *prima facie* showing.

ilege and the opponents' claim of need. Somewhat similarly, in *Halkin* v. *Helms*, 598 F.2d 1, 9 (D.C. Cir. 1978), the court observed that normally an affidavit claiming state secret claims is sufficient to sustain the claim of privilege. The *in camera* exploration was not of the content of the material sought, but rather of affidavits and testimony demonstrating that the claim of privilege was valid. Those proceedings, which the appellate court thought proper, were held only to prove the validity of the claim because of the showing of necessity for the information.

The government's attempt to draw support for its position from *Bourjaily* v. *United States*, —— U.S. ——, 107 S.Ct. 2775 (1987), is equally to no avail. *Bourjaily* concerned the showing which must be made before a co-conspirator's statement is admitted under Federal Rule of Evidence 801(d)(2)(E). In holding that the proponent of such a statement is not limited exclusively to reliance on independent review, but rather may also rely on the statement itself,[15] this Court relied on Federal Rule of Evidence 104(a). That rule provides that "[p]reliminary questions concerning . . . the existence of a privilege, or the admissibility of evidence shall be determined by the court. . . . In making its determination it is not bound by the rules of evidence *except those with respect to privileges*" (emphasis added). The Court held that Rule 104 (a) thus overrode prior existing non-constitutional evidentiary rule, *except those concerning privileges*, a point underscored by this Court. 107 S.Ct. at 2780.[16] Because

[15] This Court specifically declined to decide whether the showing could be made exclusively by reliance on the hearsay statement itself. 107 S.Ct. at 2781.

[16] The concern underlying the attorney-client privilege is quite different than that underlying the hearsay rules, which derives from the presumptive unreliability of out of court statements. *See Bourjaily*, 107 S.Ct. at 2781. The very purpose of the attorney-client privilege, in contrast, is to ensure the reliability of the client's statements to his attorney; the privilege is recognized because it serves and promotes this important societal value and interest.

Rule 104(a) and *Bourjaily*, specifically preserve pre-existing evidentiary rules with respect to the determination and application of privileges, they support the continued application of the independent evidence rule in determining the applicability of the crime-fraud exception.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: September 26, 1988

APPENDIX

Order of United States Court of Appeals

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Nos. 85-6065; 85-6105

D.C. No. CV85-440-HLH

ORDER

UNITED STATES OF AMERICA,

Petitioner/Appellee/
Cross-Appellant,

v.

FRANK S. ZOLIN,

Respondent/Appellee,

and

CHURCH OF SCIENTOLOGY OF CALIFORNIA and
MARY SUE HUBBARD,

Intervenors/Appellants/
Cross-Appellees.

Filed July 5, 1988

Before: Browning, Tang, Pregerson, Alarcon, Norris, Reinhardt, Beezer, Brunetti, Thompson and Leavy, Circuit Judges.

ORDER

The opinion published at 842 F.2d 1135 is amended to include the following concurrence:

Order of United States Court of Appeals

CONCURRENCE

NORRIS, Circuit Judge, concurring in the result:

I write separately to make it clear that I believe the independent evidence rule has been and should continue to be the law of the circuit. *See United States* v. *Shewfelt*, 455 F.2d 836 (9th Cir.), *cert. denied*, 406 U.S. 944 (1972). However, I cannot join the court's order because the majority has failed to make clear whether the order is a disposition on the merits, *i.e.*, whether it constitutes en banc authority that the *Shewfelt* independent evidence rule is the law of the circuit. If the order is intended to be a disposition on the merits, it is internally inconsistent because an en banc panel cannot both decide a case on the merits and vacate as improvidently granted the order of the full court authorizing it to decide the case.